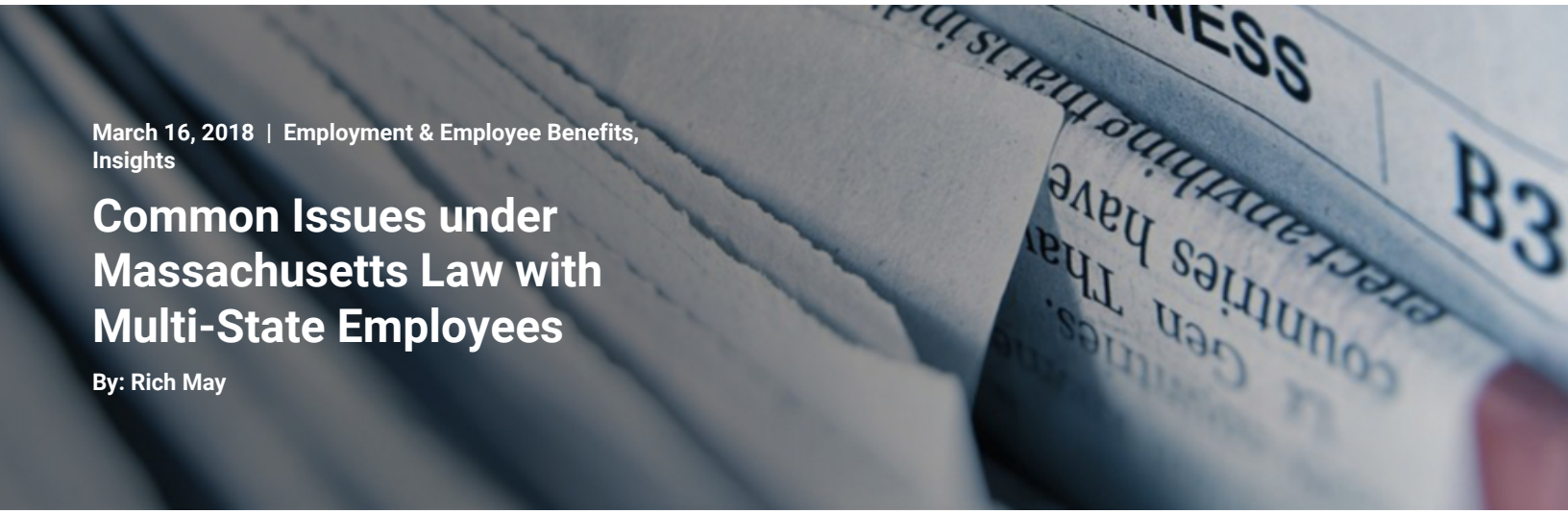

March 16, 2018 | Employment & Employee Benefits, Insights

Common Issues under Massachusetts Law with Multi-State Employees

By: Rich May

In today's workforce, many companies' employees work in a different state from their employer's office. Employees working remotely may travel to many states as part of a national or regional sales force, or they may work full-time out of their residence.

In Massachusetts, this arrangement requires careful planning by the employer in the following legal areas:

DOING BUSINESS

If an employee is working outside the employer's state of incorporation or its principal place of business, the employee's actions may require the employer to register as "doing business" in that state. In Massachusetts, an out-of-state employer is not required to register as transacting business in the Commonwealth when the employees solicit or obtain orders that require acceptance outside the state before they become contracts. If the employees can make contracts in Massachusetts without the employer's acceptance in another state, the corporation should register. While the distinction between contracting in the state and outside the state may seem inconsequential, out-of-state employers that conduct any course of repeated transactions of a like nature in the state should register.

Registration for doing business typically requires annual reports in the state as well as associated filing fees. Moreover, even if an out-of-state employer is not registered as doing business, it may still be subject to corporate excise tax or legal jurisdiction for its activities within the state. And, employees can be subject to income tax in multiple states—so employers may have to withhold in multiple states.

UNEMPLOYMENT INSURANCE

Employers should pay state unemployment tax for employees' insurance coverage. But should the employer pay tax to the state of its offices, the state of an employee's residence, or both?

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Federal Department of Labor guidance indicates that employees are covered by unemployment insurance in only one state. Accordingly, most states have adopted a four-step analysis to determine which state should cover the employee. First, if an employee performs most of its activities in a single state – either the employer's office state or the employee's state of residence or sales – that state should collect the tax. Second, if an employee's activities are not "localized" in one state under the first step, the state where the employee's operations are based should collect the tax if the employee performs some activities there. Third, if the first two steps do not apply, the employer's state's law applies if the employee performs some work in the employer's state of control. Fourth, if the employee performs only non-localized work outside of the employee's operations base and the employer's state of control, the employee's state of residence applies. Residence is assessed using factors including where the employee lives, is registered to vote, enrolls children in school, and refers to as "home". Massachusetts adopted this four-step analysis at M.G.L. c. 151A, § 3.

WORKER'S COMPENSATION

If an employee is injured at work, a question may arise over which state's law applies to the claim. Courts look to the place where the injury occurred, the place of the employment contract, and the place of the employment relationship to determine jurisdiction. Thus, an employer may be required to have coverage in multiple states – the employer's state as the place of the employment contract and additional states if the employee travels or works out of state. For example, Massachusetts requires that out-of-state employers cover employees working in the Commonwealth.

OTHER EMPLOYEE BENEFITS

A range of other employee benefits can be implicated when an employee works outside the state of the employer's office. In certain cases, the state where the employee works most determines benefits. For example, employees whose primary place of work is in Massachusetts have the right to Earned Sick Time, even if the employer is based outside the state. The employer is also required to post notice and provide a copy of the notice to their employees. Similarly, in Massachusetts, out-of-state employers must adhere to Massachusetts law by paying Massachusetts employees regular wages for the first three days of jury service.

CONTRACTUAL PROVISIONS

Many employment contracts include provisions specifying a state for the choice of law to be applied in or selecting a forum for a dispute. In some cases, those contractual provisions are unenforceable where the employee lives and works outside the specified state. For example, in June of 2017, a Massachusetts Superior Court found a Massachusetts employer's contractual provisions unenforceable against a California employee. The employer's contract required that Massachusetts law govern disputes and the adjudication of any disputes in Massachusetts. However, the employee resided in California and was hired to work at the employer's California office – so California had the most significant relationship to the employment transaction. Because the contract was not negotiated between the employer and employee, the Massachusetts court dismissed the suit – finding California the appropriate forum for litigation. The employer's contract also

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contained a non-competition agreement, which is enforceable when reasonable in Massachusetts but unenforceable in California. The Superior Court decision is currently scheduled for oral argument before the highest Massachusetts court. If the Supreme Judicial Court affirms the Superior Court's decision, the Massachusetts employer will likely have to litigate in California and will be unable to enforce its non-compete provision.

CONCLUSION

Employers with out-of-state employees or employees who work in multiple states should

exercise caution, especially with respect to state registration, insurance, and contractual provisions under Massachusetts law. Employers or employees with questions about regulatory compliance and contractual enforceability can contact Rich May, P.C. attorney Jennifer Lang. Keep an eye out for further information on the Massachusetts Supreme Judicial Court decision regarding contractual enforceability over the upcoming months!

This summary is provided for educational and informational purposes only and is not legal advice. Any specific questions about these topics should be directed to attorney Jennifer Lang.

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